Ohio's missing evidence rule

Re-visiting the importance of document retention in today's electronic era

by Jonathan Krol

It goes without saying that cases are, by and large, won or lost on the facts. Not surprisingly then, trial attorneys direct each phase of litigation at compiling evidence to establish facts most favorable to the client's case. But amidst the hustle and bustle of case handling focused primarily on gathering admissible evidence, it is not hard to lose sight of the importance of those pieces of evidence that are unavailable. While it may come as a surprise to even seasoned practitioners, cases can be decided on evidence not present at trial, due in large part to the common law "missing evidence" doctrine.

As technology evolves, methods of retaining, vetting and producing evidence—particularly electronically stored information (ESI)—become more efficient. But, all the while, these improvements result in more extensive, expensive and burdensome discovery. Despite technological advances—and, perhaps, at times because of them—relevant data can be lost, misplaced or prematurely discarded. Ohio courts have devised methods of managing these situations, premised largely on the use of permissive inferences and jury instructions. It is important for any litigator to understand the missing evidence doctrine, how it works and how the doctrine differs from spoliation.

Missing evidence versus spoliation of evidence

Although Ohio courts necessarily analyze "missing evidence" in the context of spoliation claims, judges and lawyers often conflate the two and overlook fundamental distinctions. This is not surprising, considering attorneys regularly use some aspect of the missing evidence rule in conjunction with claims of spoliation. Still, to fully grasp the concepts, one must review the missing evidence rule in isolation.

The missing evidence doctrine is akin to an evidentiary rule, or more precisely, a method of indirect proof (i.e., a type of circumstantial evidence). It is a principle that governs how and when a party can request the jury to make an inference about the evidence that is no longer available. Simply stated, Ohio courts generally require an aggrieved party to demonstrate malfeasance (or at least gross neglect) before including a jury instruction on a permissible adverse inference relating to specific missing evidence.[1] If there is no showing of wrongdoing, courts generally do not instruct the jury on negative inferences directly but rather include a general instruction on inferences.[2]

Spoliation of evidence, on the other hand, is recognized as a tort in Ohio, an element of which incorporates missing evidence. Ohio is one of a growing minority of states that recognizes spoliation as an independent cause of action. The prima facie case requires pending or probable litigation involving the plaintiff; knowledge on the part of defendant that litigation exists or is probable; willful destruction of evidence by defendant designed to disrupt the plaintiff's case; disruption of the plaintiff's case; and damages proximately caused by the defendant's acts.[3] If for no other reason, spoliation claims are significant because they may give rise to punitive damages.

Practical ramifications of missing evidence

The missing evidence doctrine is important for two reasons: to determine whether the trial judge will permit counsel to argue to the jury that an adverse inference can be drawn from the missing evidence and whether the judge will give specific instructions to the jury on adverse inferences related to missing evidence.

Even without a showing of malfeasance, the court may permit an aggrieved party to argue that the jury can, and should, make a negative inference based solely on the fact that evidence formerly in possession and control of the opposing party is no longer available. The trial judge should only do so if the other party cannot offer a reasonable explanation for failing to produce the missing evidence.[4]

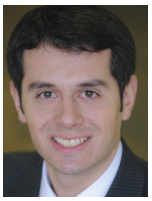
In effect, once one party demonstrates that evidence within the sole custody of another is "missing," the burden then shifts to the opposing party to offer a reasonable explanation. Failure to meet this burden will result in the judge permitting an aggrieved party to argue adverse inference to the jury—regardless of whether a specific jury instruction is given (when malfeasance or gross negligence is established).

Like other evidentiary decisions, trial courts are given much leeway in handling these situations, and appellate courts will only reverse on finding an abuse of discretion. Naturally, what constitutes a "reasonable explanation" is subject to varied interpretation. While the case law on this issue is not well developed, an excuse that evidence is "not ordinarily retained" may not be sufficient to preclude an adverse party from arguing that the missing evidence was detrimental to the party who "discarded" it.[5]

Be prepared

Although navigating the intricacies of the missing evidence doctrine is certainly not the most vital (or exciting) aspect of each trial, a firm grasp on the doctrine should be an essential part of any practitioner's toolbox. After all, issues relating to missing evidence can and do arise at trial without warning. Perhaps more important, attorneys should recognize and counsel clients on the importance of sophisticated document retention and production policies. Preventative measures are the best way to reduce the chances of damaging inferences from missing but otherwise innocuous evidence. ■

Author bio



Jonathan Krol practices in the Cleveland office of Reminger Co., LPA. He concentrates his legal practice in the areas of Professional Liability, Employment and Labor Law, and General Liability. He is a member of the Ohio State Bar Association and the Cleveland Metropolitan Bar Association.

Endnotes

1. See, e.g., *Schwaller v. Maguire*, Hamilton App. No. C-020555, 2003-Ohio-6917, ¶24 ("Ohio courts normally would require a strong showing of malfeasance—or at least gross neglect—before approving such a charge." (Quotation omitted)).
2. See, e.g., Ohio Jury Ins. CV 207.07.
3. See *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St.3d 28, 29 (1993); Ohio Jury Ins. CV 437.01.
4. See *Clifton v. Ohio Dep't of Rehab. & Corr.*, Franklin App. No. 06AP-677, 2007-Ohio-3791, ¶35 (citing *Cherovsky v. St. Luke's Hosp. of Cleveland*, Cuyahoga App. No. 68326 (Dec. 14, 1995)).
5. See, e.g., *Branch v. Cleveland Clinic Found.*, Cuyahoga Cty. No. 95475, 2011-Ohio-3975 (permitting counsel to argue adverse inference despite testimony presented to establish that the missing evidence was not ordinarily retained).